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4/12/82

"INTERPRETER SERVICES AT A UNIVERSITY: WHO PAYS?"
Duane M. French

History

Alaska's Division of Vocational Rehabilitation (DVR) is leading the nation by taking a strong stand in support of the position it is a university's responsibility, under the Americans with Disabilities Act (ADA), to provide interpreter services for deaf students. The University of Alaska is threatening to sue DVR based on their belief DVR has an obligation to provide interpreter services under the Rehabilitation Act of 1973, as amended.

Alaska DVR stopped paying the cost of interpreter services nearly three years ago, soon after promulgation of regulations for Title II of the ADA. Alaska VR believes, pursuant to the regulations, the legal obligation lies in the hands of the university. 28 CFR S 33.160 reads as follows:

"Public institutions of higher education are required to furnish appropriate auxiliary aids and services, including qualified interpreters, where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by the institution."

The University of Alaska argues Section [103-a] (6) of the Rehabilitation Act requires DVR to provide "interpreter services for deaf individuals, and reader services for those individuals determined to be blind." The university deems interpreter services to be a rehabilitation service. Therefore, it questions why it should pay for such a service when the Governor has named

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DVR the Designated State Unit as required in the Rehab Act. The University of Alaska claims the cost of interpreter services to be approximately \$200,000.00 per year for the entire State university system.

The Impact of this Issue

The impact of the interpreter services issue looms large for people who are deaf, as it could limit their ability to have qualified interpreters available for classes at the University of Alaska. Significant delays to deaf students' educational and career pursuits will be caused if interpreter services are unavailable.

Besides the impact on deaf students, other people with disabilities receiving services through DVR may be impacted by a loss of funding. Should the university file a lawsuit, the associated attorney's fees will deprive DVR of funds that could be spent on the provision of client services. Should the university prevail in a lawsuit, it would open the door to other state agencies expecting DVR to pay for interpreter services. This, too, will deplete resources available for rehabilitation services.

The most dramatic impact is on how deaf students are treated in a university setting. Students go to a university, pay their tuition and fees, and get the information and education they expect to be provided. Universities would treat deaf students differently by charging an additional fee because deaf students need an interpreter.

The Department of Justice (DOJ) recently ruled universities

cannot "coerce" deaf students to apply for VR services as a means to get VR to pay for interpreter services. In the opinion of the Alaska Division of Vocational Rehabilitation, this ruling does not go far enough in clearly deciding the entity responsible for providing interpreter services in a university setting.

Analysis

In essence, it appears to the Alaska DVR, universities are placing a surcharge on deaf students above and beyond charges to students who are not deaf. Suppose, in the spirit of the ADA, a university hired a deaf professor who only communicated with American Sign Language (ASL), would the university charge hearing students, or an entity supporting them in their education, for an interpreter so these students could get the necessary information?

The reason Alaska DVR believes payment for interpreter services to be a surcharge is because deaf students, or an entity supporting them in their educational pursuits, are being charged a fee, above and beyond the standard tuition and fees, to get the same information made available to hearing students who only pay the standard tuition and fees. The ADA clearly states a public entity may not charge an individual with a disability for the use of an auxiliary service.

Rehabilitation services are funded through an Individualized Written Rehabilitation Plan (IWRP), developed for each person served. Payment for acquiring training and education must be charged against each individual with a disability receiving services from VR, funds are not spent for interpreter services

unrelated to a specific student. As such, interpreter services cannot be covered in an IWRP unless the university is charging each student for these services. Therefore, the university is charging deaf students more to attend the university than it is charging hearing students. In the opinion of the Alaska Division of Vocational Rehabilitation, this qualifies as unequal treatment under both the ADA and Section 504.

Payment for interpreter services at a university is no different than ADA, Title IV provisions calling for telephone companies to make a telephone relay service available to people who are deaf. Does the ADA allow telephone companies to charge VR for relay services for users who receive VR services? Of course not. Telephone companies are expected to spread the additional cost of offering relay services to all customers, with deaf users paying an amount "equal" to what hearing customers pay. The same argument could be applied to visits with a physician for deaf people. Physicians cannot charge their deaf patients for the cost of interpreter services. These costs are expected to be charged proportionately to all patients, even if the deaf patient is receiving services from DVR.

Universities are required under the ADA and Section 504 of the Rehab Act to make their programs and activities accessible to people with disabilities. Do universities and the DOJ expect VR to pay for architectural modifications because people receiving VR services use these modifications to attend school? Obviously, the answer is no. It is clear accessibility modifications are the

responsibility and obligation of the university under the ADA and Section 504. If VR is required to provide interpreter services and architectural modifications, it will change the entire nature of the program to be one of ADA and 504 accessibility. This was never the intent of Congress.

Alaska DVR spends between \$660,000 to \$838,000 each year sending people with disabilities through the University of Alaska statewide system. The Alaska Division of Vocational Rehabilitation is willing to pay its fair share if interpreter services costs are spread across all students as part of a minimal increase in tuition and fees. In most instances, universities could add a one dollar charge per credit hour to tuition and fees and the cost of interpreter services, and other services for people with disabilities (reader services, note takers, etc.) can be covered with the additional revenues generated. The University of Alaska has 28,145 students enrolled this fall for 227,842 credit hours. With a one dollar per credit hour additional charge, the University will yield \$227,842 in additional revenues. \$227,842 would cover the costs of interpreter services, reader services and other auxiliary aids, based on past usage and experience at the university.

Conclusion

In conducting research on this issue, Alaska DVR found nine states where VR is paying the full cost of interpreter services at universities, twelve states where VR is paying a portion (usually 50/50) and seven states where the university pays the full costs

of interpreter services. In six other states surveyed it was difficult to determine who pays, VR or the university. Based on the responses gathered from 34 states responding to the survey, it is apparent there exists a great deal of confusion surrounding this issue, and DOJ needs to provide greater clarity concerning the entity ultimately responsible.

Many of the state VR agencies surveyed said they paid for interpreter services because, "Deaf students would suffer otherwise." Alaska DVR believes deaf people will suffer more from the continuance of discrimination from universities, than if state VR agencies and the DOJ tackle this issue head on and demand deaf students be treated equally. The Alaska Division of Vocational Rehabilitation holds firm to its position that universities are responsible, under the ADA and Section 504, for providing interpreter services to students who are deaf.

PROVISION OF AUXILIARY AIDS AND SERVICES TO VOCATIONAL REHABILITATION CLIENTS IN POSTSECONDARY EDUCATIONAL PROGRAMS

POSITION STATEMENT

- This paper presents the position of Oklahoma Department of Rehabilitation Services (DRS) regarding the provision of auxiliary aids, including interpreter services, for vocational rehabilitation consumers participating in postsecondary educational programs. Based on an analysis of prevailing federal legislation, regulations and policy interpretations, it is our conclusion that public and private postsecondary institutions maintain legal responsibility for the provision of auxiliary aids and services to all students with disabilities, including those whose tuition and fees are paid for by DRS. The Oklahoma Department of Rehabilitation Services is prohibited from providing such services if they are mandated to be provided by other public or private entities under law or regulation.

Responsibility of the State Vocational Rehabilitation Agency

The Oklahoma Department of Rehabilitation Services recognizes its own responsibilities under Section 504 of the Rehabilitation Act and the Americans With Disabilities Act to provide auxiliary aids and services necessary to make the agency's rehabilitation programs accessible. The Department does, and will continue to provide those direct services to help achieve a client's vocational goal. However, postsecondary education is not a direct service provided by the Oklahoma Department of Rehabilitation Services. Postsecondary education is a service purchased from public and private vendors, like medical, transportation and other services, to help a client reach a specific vocational goal. The Rehabilitation Act does not include language that requires DRS to pay for the compliance obligations of public or private vendors. With the exception of a few postsecondary educational contracts which are being phased out, DRS has not paid for the compliance obligations of its vendors for several years. Language included in the Rehabilitation Act Amendments of 1998 mandate otherwise.

DRS operates an interpreter service program mandated by Oklahoma state law¹ and authorized under the Rehabilitation Act² to deaf and hearing impaired individuals throughout the state. However, this program does not pay for interpreter services for public programs (government agencies, public schools, courts, jails, etc.) or private entities (hospitals or other health providers, employers, etc.) who have a legal obligation to provide the service themselves.

Changes Mandated by the Rehabilitation Act Amendments of 1998

Existing sections of the Rehabilitation Act of 1973 establish the overall requirement that rehabilitation agencies maximize federal dollars by seeking other available benefits and services before spending federal funds. Rehabilitation agencies must access these *comparable benefits* prior to providing any vocational rehabilitation services. However, the Rehabilitation Act Amendments of 1998 emphasized the practice by clarifying what services provided by other entities are regarded

as comparable benefits.³

Section 101(8)(B) of the Act requires interagency agreements regarding the provision of vocational rehabilitation services.⁴

Section 101(8)(C) mandates that if a public entity is required by any law, regulation or policy to provide or pay for services which may be considered comparable benefits, the public entity "*shall fulfill that obligation or responsibility*"⁵. In essence, the section requires DRS to regard those compliance responsibilities as comparable benefits which must be used prior to the expenditure of rehabilitation funds for those services. The section references services exempted from public entity responsibility (information and referral services for clients who do not meet the state's order of selection, assessment, counseling and guidance, referral services, job-related services, and rehabilitation technology). These services must still be provided by vocational rehabilitation agencies. However, interpreter services are not a service exempted from higher education compliance responsibility.

The section further mandates that if the public entity fails to provide the required service, DRS is instructed to provide the service and bill the public entity for reimbursement.⁶

Responsibility of Postsecondary Institutions

A number of federal laws, regulations, and policy guidance directives have been implemented since the passage of the Rehabilitation Act of 1973⁷ shaping public policy and delineating responsibility for the provision of auxiliary aids to students with disabilities and vocational rehabilitation clients in postsecondary educational programs.

The Rehabilitation Act of 1973 requires post secondary schools that receive federal financial assistance to provide appropriate auxiliary aids.⁸ Subpart E of the regulations, issued by the U.S. Department of Education for Section 504 of the Rehabilitation Act, provides that:

A recipient...shall take such steps as are necessary to ensure that no disabled student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.⁹

Regulations implementing Title II of the Rehabilitation Act further state:

A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by the public entity.¹⁰

Regulations implementing Title II¹¹ and Title III¹² of the Americans With Disabilities Act require public institutions of higher education to furnish appropriate auxiliary aids and services, including qualified interpreters, where necessary, to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by the institution.

With chief enforcement responsibilities for the Americans With Disabilities Act, the U.S. Department of Justice continually and consistently reiterates, through policy interpretations and publications, postsecondary responsibility for providing auxiliary aids and services. Furthermore, the Department of Justice has held that a college's obligation to provide auxiliary aids is not dependent on the student's financial need or the availability of vocational rehabilitation or other funding.¹³

Conclusion

Public policy over the past three decades, as well as the specific requirements of the Rehabilitation Act Amendments of 1998 mandate vocational rehabilitation agencies to maximize federal dollars while providing expanded services to an increasing base of consumers with more severe disabilities. The existence of an order of selection in Oklahoma acknowledges that vocational rehabilitation resources are insufficient to serve all eligible applicants. The comparable benefits sections of the 1998 amendments clarify Congressional expectations that postsecondary institutions and other public entities meet their compliance responsibilities under the Rehabilitation Act and the Americans with Disabilities Act.

Postsecondary institutions have generally based their opposition to providing auxiliary aids and services to rehabilitation clients on two arguments. First, the Jones vs. Illinois court case, a 1981 Illinois federal district court decision, held that when post secondary institutions and vocational rehabilitation programs share responsibility for the provision of auxiliary aids, rehabilitation agencies had primary responsibility to provide the service. However, the 1988 regulations implementing Section 504 of the Rehabilitation Act, the Americans With Disabilities Act of 1990 and implementing regulations, as well as the provisions of the Rehabilitation Act Amendments of 1998, all contain language suggesting postsecondary responsibility and reverse or nullify the Jones decision. ←

Secondly, postsecondary institutions argue that they already expend large amounts of their budget to provide architectural and programmatic accommodations to students with disabilities. While such institutions are to be complimented on their progress in efforts to comply with the Rehabilitation Act and the Americans With Disabilities Act, their obligation to provide auxiliary aids and services to students with disabilities is not dependent on the availability of vocational rehabilitation, or other outside funding.¹⁴

FOOTNOTES

- 1 56 O.S. Supp. 1998, Section 199.2(b)
- 2 Section 103(A)(10) of the Rehabilitation Act Amendments of 1998 (Public Law 105-220)
- 3 Section 101(8)(A) of the Rehabilitation Act Amendments of 1998 (Public Law 105-220), per
Appendix I
- 4 Section 101(8)(B) of the Rehabilitation Act Amendments of 1998 (Public Law 105-220), per
Appendix I
- 5 Section 101(8)(C) of the Rehabilitation Act Amendments of 1998 (Public Law 105-220), per
Appendix I
- 6 Section 101(8)(C)(ii) of the Rehabilitation Act Amendments of 1998 (Public Law 105-220),
per Appendix I
- 7 29 U.S.C. Section 794 (Public Law 93-112, as Amended)
- 8 34 C.F.R. 104.44(d)
- 9 34 C.F.R. 104, per Appendix II
- 10 34 C.F.R. 104.44(d)(1). Section 35.160(b)(1) of the Title II regulation, per Appendix II
- 11 28 C.F.R. Section 35.160, per Appendix III
- 12 28 C.F.R. Section 36.303, per Appendix III
- 13 U.S. Department of Justice, Civil Rights Division correspondence to Assistant Secretary for
Civil Rights, U.S. Department of Education as reported in U.S. Department of Education,
Office of Special Education and Rehabilitation Services, per Appendix III
- 14 *Ibid.*

APPENDIX

- Appendix I** excerpts from the Rehabilitation Act Amendments of 1998 (Public Law 105-220)
Comparable Benefits, Title I, Section 101.(A)(8) *et. seq.* (*emphasis added*)
- Appendix II** Auxiliary Aids and Services for Postsecondary Students With Disabilities: Higher
Education's Responsibilities under Section 504 and the American With Disabilities
Act, U.S. Department of Education, Office for Civil Rights, Internet Web Site
(www.ed.gov/offices/OCR/auxaids), October, 1996, (*emphasis added*)
- Appendix III** U.S. Department of Education, Office of Special Education and Rehabilitation
Services, Rehabilitation Services Administration, Information Memorandum (RSA-
IM-96-04), November 20, 1995 (*emphasis added*)

How to Determine if a Post-Secondary Support Service Is the Responsibility of DVR or the School

Test 1 - Is there a cause-effect relationship between the consumer's disability and the need for the service being requested? If not, the service does not fall under this determination.

Test 2a - Is the service needed for the student to participate in a classroom or other official school-sponsored activity? If yes, the responsibility lies with the school to make the program activity accessible. The possible exception to test 2a is covered under test 2b.

An example of a service that is not specifically linked to classroom and other official activities is transportation around campus. If a student needs help getting to and from classes around campus, DVR can assist with the cost of that service.

Test 2b - Does the school charge students for the service needed for the student to participate in a classroom or other school-sponsored activity? If yes, DVR can assist the student in meeting the cost of the service.

An example is tutoring. Free group tutoring may be offered to students who need the service. But individual tutoring is provided at a charge to the student. If the student needs individual tutoring because of his/her disability and there is a charge for this service, DVR can assist the student in meeting the cost.

Test 3 - What is the most cost effective method for meeting the student's service need? This determines a maximum amount for possible DVR participation. These service costs may also be limited by availability of similar benefits, grants, and consumer required contribution. It is also possible that the most cost effective method of providing the service is not to purchase the service from the school but from a third party.

Test 4 - How would the student like the service to be provided, and is the consumer willing to shoulder any additional costs created by his/her decision? The consumer ultimately has the choice of how the service is provided, but if his/her choice is not the most cost effective method, the consumer must pay any additional costs.

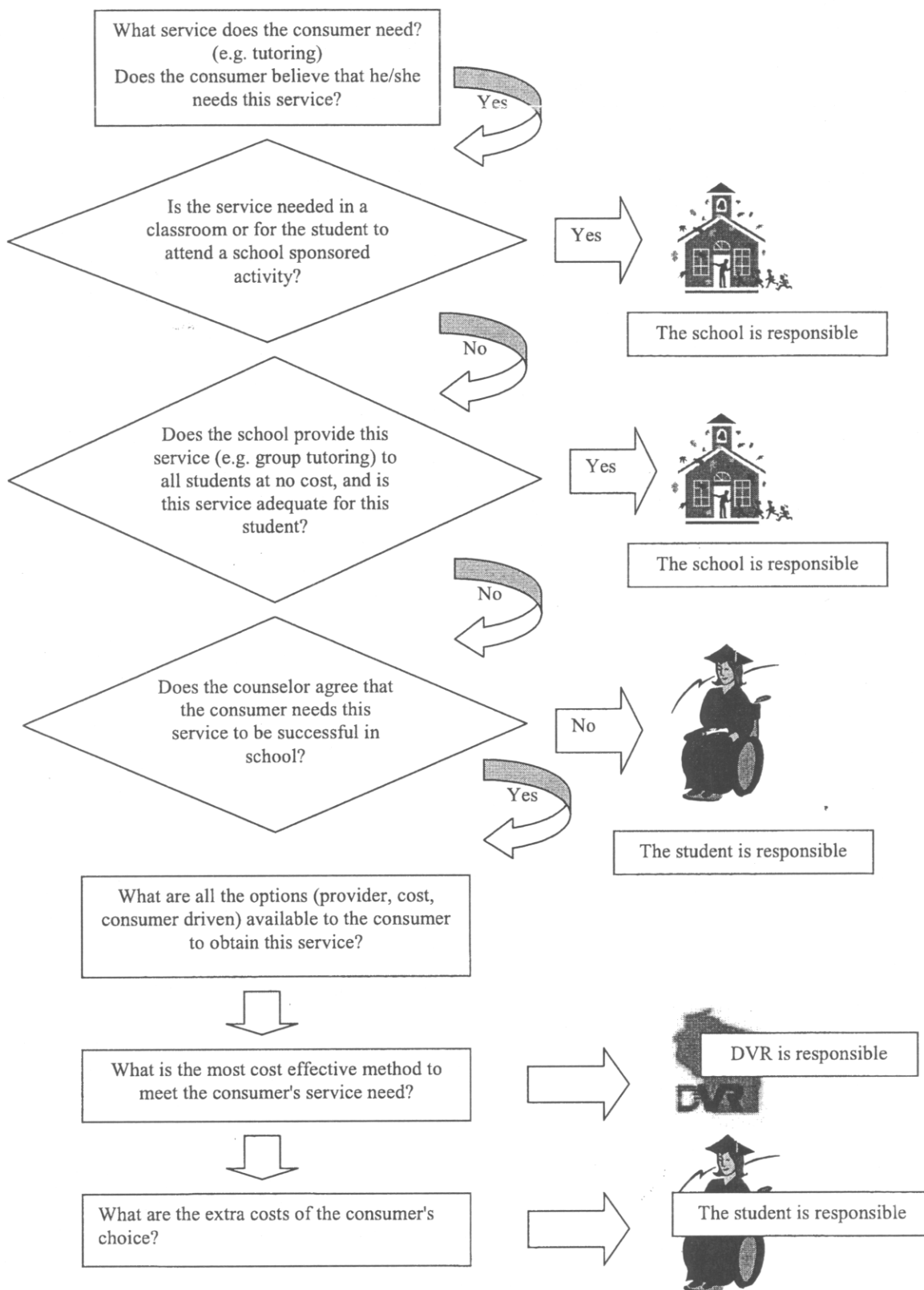
Making authorizations for payment:

1 - If the service is the responsibility of the school, DVR does not issue purchase orders for those services. During the MOU transition years, DVR may pay for some of those services, but counselors do not issue purchase orders. Invoices from the school are sent directly to DVR Central Office, 201 East Washington Avenue, P.O. Box 7852, Madison, WI 53707-7852.

2 - If the service is the responsibility of DVR, purchase orders are issued by the counselor prior to the service being provided. These costs are charged against the counselor's discretionary budget.

Questions about specific situations related to how a determination of responsibility is made should be directed to Michael Gilbert (mike.gilbert@dwd.state.wi.us) or Manuel Lugo (manuel.lugo@dwd.state.wi.us).

Who is Responsible for Paying for the Service?



Post Secondary Education Questions and Answers

Introduction

The situations described below assume:

1. That the student has been found eligible as a DVR consumer and as a qualified student with a disability at the school.
2. That the school, the student, and the DVR counselor all agree that the service discussed is needed by the student and that it is not available from another source.

If these two conditions are not met, the student will not be able to receive funding for the service. The Disability Services office can explain the eligibility requirements of their program, and a DVR counselor can explain the eligibility requirements for DVR.

There is no intention in this analysis to cover every possible situation which may arise for students with disabilities or to govern the legal liability issues contained in these situations. The specific purpose of this paper is to provide guidance to DVR counselors and consumers in answering questions related to the development of plans for employment. Exceptional circumstances warranting deviation from these guidelines should be brought to the attention of the management of the Bureau of Consumer Services in DVR.

Both private and public schools are covered by these responsibilities if they receive federal financial aids.

Who will pay for the services I need in school?

First, you need to determine what support services you will need to be successful in your post secondary training. Your DVR counselor and the Student Services office at the school you are attending can help you with this. But, if someone recommends a service, find out about the service and decide for yourself whether you think it will really help you.

Equally important, your DVR counselor must also believe that you need the service if DVR will be paying for any part of the service. In addition, it is important that you get your counselor's permission in advance of getting the service. If you do not get your counselor's agreement and permission before you receive the service, you may need to pay for it yourself.

Will I be responsible for any of the costs myself?

Your counselor will help you complete a needs test. If your family's income is high enough, you may need to pay for part of the cost of your specialized support services. Furthermore, if you select a type of service that is not the most cost effective available, you will need to pay the extra costs.

If I pay the extra costs, can I select any provider I want?

Yes. For example, if the most cost effective way for you to get back and forth to classes is to take the bus (which costs \$20/mo.) but you would prefer to pay a friend to drive you back and forth and the friend insists on \$30/month, DVR would pay the \$20 and you would need to pay the extra \$10. But, the choice is yours.

Who pays for alternative testing?

Some disabilities require that the student take tests in separate rooms, that they be read to the student by another, or that extra time be allowed. These alternative methods of test taking sometimes require a special proctor be present. If you require alternative testing methods, the school is responsible for paying for this since test taking is an intrinsic part of attending a class.

Who pays for personal attendant services?

If you need someone to help you periodically through the day (including in the classroom) with toileting and eating, DVR is responsible for paying for that service.

If you need someone in the evening and in the morning before school to help you with self care and dressing at home, that may be the responsibility of the county or medical assistance. If it is a service which was performed for you prior to you attending school, you will have to pay for it yourself if you do not have other resources. If prior to attending school your parents did this for you, but now you need an attendant, then DVR is responsible for paying for this service.

Who will pay for interpreter services?

If you require sign language interpreter services to attend school, the school is responsible for paying for those services for your classes and school activities.

What if I use a white cane and I need help getting oriented to the campus prior to starting school? Who will pay for that?

DVR.

What if I need another student to take notes for me in my classes? Who will pay for that?

The school as long as it has been determined that it is an appropriate accommodation based on your disability. This is often handled through the use of volunteers.

What if I need a mentor? Who will pay for that?

If you need a mentor, you will need to check out whether the school provides this service free of cost to students with disabilities who are not DVR consumers. If it is provided free to other students, the school will pay for it for you. If other students have to pay for it, then, DVR can help pay for it for you.

What if I need accommodations on a work study, internship site, or a traineeship site?

If the school sets up work sites for other students as a part of their training, the school will also find a work site for you. If you need worksite accommodations at one of these sites, the school will provide those accommodations.

If you have not worked before and need work experience as part of your training, but this is not a service provided by the school for students, DVR will assist you in finding a work site and paying for the work experience.

What if I need help with specialized transportation back and forth to campus and around the campus? Who pays for that?

If the school provides this service at no cost to students with disabilities who are not DVR consumers, then the school will also provide it for you without a cost.

If not, DVR will pay for specialized transportation, but your counselor will ask you to explore different options. Would you prefer traveling by bus, by cab, or having a friend, neighbor or relative drive you? Once you have explored all your options, DVR will pay the amount of the most cost effective method available that meets your needs. You can pick which method you want to use. If the method you choose is not the most cost effective method, you will need to pay the extra.

If I need a computer, who will pay for it?

This answer will depend on which school you are attending, whether they require all students to have computers, whether they have a computer lab available for students to use, and whether you require specialized hardware or software because of your disability. If you are concerned about this, discuss your particular situation with your DVR counselor.

What if I need assistive devices, like a communications board, a scooter, or other technology device?

Mostly this answer depends on whether you need the technology in the classroom to attend classes, or whether it is needed to get around campus. If you need it in the classroom or in order to participate in school-sponsored activities (such as an adjustable table in the classroom), the school would be responsible. On the other hand, the device would remain in the classroom and be the property of the school.

If you need it to get back and forth to campus, to get around campus, or in other situations outside of the classroom, DVR will pay for it.

What if I need my texts taped or Brailled? Who pays for that?

If the text is required by a class, the school must pay for having it taped or Brailled. Likewise, the school must make class handouts and other required readings available to you in a format you can use. (In these situations, however, you are responsible for buying the book which is being translated to another format.)

If a book is recommended but not required, you will be required to explain to your DVR counselor why you feel you need it. If you and your counselor both agree that you should have it, DVR may pay for the cost of an alternative format.

What if I need a tutor? Who will pay for that?

Schools provide tutoring services free of charge to students who need them. Sometimes these services are only available a limited number of hours per week. Some schools provide group tutoring only. If the tutoring the school provides for other students is OK for what you need, then the school will pay for it.

But, if you need a type of tutoring the school does not provide free of charge to other students, then DVR will pay for it.

DWD is an equal opportunity employer and service provider. If you have a disability and need to access this information in an alternate format, or need it translated to another language, please contact 800-442-3477 or 888-877-5939 (TTY).

Post Secondary Title

InterOffice Memo

Department of Workforce Development

Date: June 10, 2002

To: Charlene Dwyer, Administrator
Division of Vocational Rehabilitation

FILE COPY

From: Howard Bernstein
DWD Legal Counsel (266-9427)

Subject: The Obligation of Educational Institutions to Provide Auxiliary Aids for
Students with Disabilities

You have asked me to review the position currently taken by your division that institutions of higher education are required by law to provide auxiliary aids, such as interpreter services, to disabled students who require such aids for an equal opportunity to receive the benefits of a university education.

In my opinion, your position is consistent with and required by the Rehabilitation Act Amendments of 1998, the current regulations of the U.S. Department of Education, and the guidance and responses to complaints issued by the U.S. Department of Education and the U.S. Department of Justice. It is now clear that institutions of higher education may not require disabled students to apply for assistance to the state vocational rehabilitation agency, or in any way place a surcharge, restriction or special condition on their obligations under the Rehabilitation Act and the Americans with Disabilities Act.

The decision in the case of Jones v. IDRS, 689 F. 2d 724 (7th Cir. 1982), which states that the state vocational rehabilitation agency bears the primary responsibility for auxiliary aids, is based on the former federal regulations and their distinct history and commentary. The rationale of that decision does not apply to the amended regulations and the 1998 amendments.

cc: Eric Baker

[Code of Federal Regulations]
[Title 34, Volume 2]
[Revised as of July 1, 2001]
From the U.S. Government Printing Office via GPO Access
[CITE: 34CFR361.27]

[Page 290]

TITLE 34--EDUCATION

CHAPTER III--OFFICE OF SPECIAL EDUCATION AND
REHABILITATIVE SERVICES, DEPARTMENT OF EDUCATION

PART 361--STATE VOCATIONAL REHABILITATION SERVICES PROGRAM--Table of Contents

Subpart B--State Plan and Other Requirements for Vocational
Rehabilitation Services

Sec. 361.27 Shared funding and administration of joint programs.

(a) If the State plan provides for the designated State agency to share funding and administrative responsibility with another State agency or local public agency to carry out a joint program to provide services to individuals with disabilities, the State must submit to the Secretary for approval a plan that describes its shared funding and administrative arrangement.

(b) The plan under paragraph (a) of this section must include--

- (1) A description of the nature and scope of the joint program;
- (2) The services to be provided under the joint program;
- (3) The respective roles of each participating agency in the administration and provision of services; and
- (4) The share of the costs to be assumed by each agency.

(c) If a proposed joint program does not comply with the statewideness requirement in Sec. 361.25, the State unit must obtain a waiver of statewideness, in accordance with Sec. 361.26.

(Approved by the Office of Management and Budget under control number 1820-0500.)

(Authority: Section 101(a)(2)(A) of the Act; 29 U.S.C. 721(a)(2)(A))

Effective Date Notes: 1. At 66 FR 7253, Jan. 22, 2001, Sec. 361.27 was amended by adding "(Approved by the Office of Management and Budget under control number 1820-0500)", effective Oct. 1, 2001.

ACCESS SERVICES HISTORY IN HIGHER EDUCATION SETTINGS

- The 1982 Jones Vs IDORS Illinois Circuit Court case decision said that both the state vocational rehabilitation program and the educational institutions are responsible for seeing to it that students with a disability [and clients of DVR] are able to attend educational programs with necessary supports. It gave the lead to the state DVR in this when there was a common customer between the two public entities.
- The 1990 American Disabilities Act [ADA] when it was passed said all public institutions are responsible for program access.
- In 1998 the Workforce Investment Act [WIA] was passed. It pulled together 14+ workforce related programs [the vocational rehabilitation programs were included] and said there should be 'one stop delivery of service', 'no wrong door' and 'universal access'.
- Title IV of the WIA relates to the delivery of vocational rehabilitation services.
- The DWD Legal Team read the WIA Conference Committee report [the House and Senate background discussion which gives insight to the intent of the Act]
- The WIA does not create a federal mandate that educational institutions must now pay for access services, rather it leaves it up to states to decide their role and negotiate this.
- The WIA, for the first time, puts the Governor in the lead of this process of negotiation between the DSU (state vocational rehabilitation agency) and the educational institutions.
- The WIA Conference Committee report states that the ADA places a heavy burden on the educational institutions, as public institutions, to provide access services for persons who are disabled.

DWD Legal department review of WIA and the Rehabilitation Act of 1998 as amended and opinion on responsibility for the provision of auxiliary aids (June 2002)

"You have asked me to review the position currently taken by your division that institutions of higher education are required by law to provide auxiliary aids, such as interpreter services, to disabled students who require such aids for an equal opportunity to receive the benefits of a university education.

In my opinion, your position is consistent with and required by the Rehabilitation Act Amendments of 1998, the current regulations of the U.S. Department of Education, and the guidance and responses to complaints issued by the U.S. Department of Education

07/28/02

and the U.S. Department of Justice. It is now clear that institutions of higher education may not require disabled students to apply for assistance to the state vocational rehabilitation agency, or in any way place a surcharge, restriction or special condition on their obligations under the Rehabilitation Act and the Americans with Disabilities Act.

The decision in the case of Jones v. IDRS, 689 F. 2d 724 (7th Cir. 1982), which states that the state vocational rehabilitation agency bears the primary responsibility for auxiliary aids, is based on the former federal regulations and their distinct history and commentary. The rationale of that decision does not apply to the amended regulations and the 1998 amendments."


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National Association for the Deaf Position Paper:

Responsibility for Cost of Communications Access Services for Students Who are Deaf or Hard of Hearing at Colleges and Universities

This position paper reflects the views of NAD, but not necessarily those of PEPNet. Members of the PEPNet community may want to share views and concerns related to this position paper. We encourage readers to meet with local members of NAD to share good working relationships with Vocational Rehabilitation and emphasize the need for cooperation and collaboration. A contact list from the NAD Board and the Office of the Executive Director is provided at the end of this position paper.

It is the position of the National Association of the Deaf (NAD) that American colleges and universities are responsible for the cost of communication services for students who are deaf or hard of hearing. This allows for equal access as specified by the Americans with Disabilities Act (ADA). Such services include, but are not limited to, sign language and oral interpreter services, computer assisted real time captioning services, and related communication accommodations that are determined by the needs of individual students.

Historically speaking, many colleges and universities have fully accepted their responsibility to provide communication access in order to meet the needs of deaf or hard of hearing students, which the NAD applauds. Other institutions have reluctantly accepted this responsibility by providing services that are less than adequate, thus jeopardizing the academic or vocational success of their students. In some states, colleges or universities and state vocational rehabilitation (VR) agencies have worked together to resolve the cost issues of providing communication access at these public institutions.

The NAD recognizes that ADA compliance is a major financial concern for colleges and universities. However, the NAD also finds that this law specifies that public institutions like colleges and universities have a full responsibility and legal obligation to provide communication access.

While the NAD is sympathetic to the concerns of colleges and universities regarding the high cost of providing communication access for students who are deaf and hard of hearing, it advocates spreading the cost among all students, not just those with different types of disabilities. These costs should be factored into the overall institutional budget, in which case the cost of access becomes less burdensome and not discriminatory to a student with a disability.

This principle is true today for television and telephone access,

for example. All consumers of television programming now pay for the closed captioning chip. With this chip, all television sets have closed captioning features at no additional cost to consumers who are deaf or hard of hearing, regardless of whether or not this feature is used by the general public. Likewise, in many states all telephone consumers, including those who are deaf or hard of hearing, pay small monthly surcharges to cover the costs of telephone relay services and/or specialized telecommunications equipment distribution programs. This allows consumers who are deaf and hard of hearing to have equal access to the telephone system.

In other words, the public is making services and programs accessible by providing access in compliance with the ADA, while spreading the cost of making those accommodations to all consumers of a given service or entity. The ultimate benefit of this shared cost method is that everyone in the public benefits from better communication access.

To ensure that students who are deaf or hard of hearing will not experience communication access barriers as they enroll in or continue their training at colleges or universities, the NAD encourages development of interagency agreements between colleges or universities and state VR agencies to outline responsibilities. These interagency agreements should clarify that the state VR agency will help fund communication access services if colleges or universities are unwilling or unable to do so, and that state VR agencies can seek reimbursement as outlined in the 1998 Amendments to the Vocational Rehabilitation Act (as contained in the Workforce Investment Act of 1998).

The NAD believes that state VR agencies should focus more on providing rehabilitation services to eligible consumers, including those disadvantaged deaf adults who cannot benefit from college training, rather than expending funds to ensure communication access in colleges and universities. It is not the role of state VR agencies to provide funds to public entities, including colleges and universities, in order to get them to comply with ADA requirements. Available funding for state VR agencies has been shrinking for decades, resulting in fewer consumers with disabilities receiving services. In addition, the cost of serving people with disabilities has risen faster than increases in federal funding.

Although there have been a number of court decisions in the past regarding Section 504 of the Rehabilitation Act, which requires state VR agencies to share the cost of interpreter services for their deaf or hard of hearing clients who are attending colleges and universities, Section 504 was enforced during a time when the ADA was not yet a legal reality. These court decisions should thus not be used as a legal basis for colleges and universities to seek continued funding support from state VR agencies.

Therefore, the NAD believes that colleges and universities should earmark and commit appropriate institutional funding to cover the costs associated with various campus accommodations for their students with disabilities. Some schools may determine

that they will need to pursue supplemental appropriations from state and/or federal governments to help cover some of the costs. The NAD is prepared to collaborate with state affiliates, national disability consumer organizations, and colleges or universities to obtain the funding needed to make colleges and universities fully accessible to students with disabilities, including those who are deaf and hard of hearing.

This position paper was approved by the NAD Board of Directors on January 31, 2000.

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§ 361.53 Comparable services and benefits.

(a) Determination of availability. The State plan must assure that prior to providing any vocational rehabilitation services, except those services listed in paragraph (b) of this section, to an eligible individual, or to members of the individual's family, the State unit must determine whether comparable services and benefits, as defined in §361.5(b)(10), exist under any other program and whether those services and benefits are available to the individual unless such a determination would interrupt or delay—

- (1) The progress of the individual toward achieving the employment outcome identified in the individualized plan for employment;
- (2) An immediate job placement; or
- (3) The provision of vocational rehabilitation services to any individual who is determined to be at extreme medical risk, based on medical evidence provided by an appropriate qualified medical professional.

(b) Exempt services. The following vocational rehabilitation services described in § 361.48(a) are exempt from a determination of the availability of comparable services and benefits under paragraph (a) of this section:

- (1) Assessment for determining eligibility and vocational rehabilitation needs.
- (2) Counseling and guidance, including information and support services to assist an individual in exercising informed choice.
- (3) Referral and other services to secure needed services from other agencies, including other components of the statewide workforce investment system, if those services are not available under this part.
- (4) Job-related services, including job search and placement assistance, job retention services, follow-up services, and follow-along services.
- (5) Rehabilitation technology, including telecommunications, sensory, and other technological aids and devices.
- (6) Post-employment services consisting of the services listed under paragraphs (b)(1) through (5) of this section.

(c) Provision of services.

- (1) If comparable services or benefits exist under any other program and are available to the individual at the time needed to ensure the progress of the individual toward achieving the employment outcome in the individual's IPE, the designated State unit must use those comparable services or benefits to meet, in whole or part, the costs of the vocational rehabilitation services.
- (2) If comparable services or benefits exist under any other program, but are not available to the individual at the time needed to ensure the progress of the individual toward achieving the employment outcome in the individual's IPE, the designated State unit must provide vocational rehabilitation services until those comparable services and benefits become available.

→ (d) Interagency coordination.

(1) The State plan must assure that the Governor, in consultation with the entity in the State responsible for the vocational rehabilitation program and other appropriate agencies, will ensure that an interagency agreement or other mechanism for interagency coordination takes effect between the designated State vocational rehabilitation unit and any appropriate public entity, including the State entity responsible for administering the State medicaid program, a public institution of higher education, and a component of the statewide workforce investment system, to ensure the provision of vocational rehabilitation services (other than those services listed in paragraph (b) of this section) that are included in the IPE, including the provision of those vocational rehabilitation services during the pendency of any interagency dispute in accordance with the provisions of paragraph (d)(3)(iii) of this section.

→ (2) The Governor may meet the requirements of paragraph (d)(1) of this section through—

- (i) A State statute or regulation;
- (ii) A signed agreement between the respective officials of the public entities that clearly identifies the responsibilities of each public entity for the provision of the services; or
- (iii) Another appropriate mechanism as determined by the designated State vocational rehabilitation unit.

(3) The interagency agreement or other mechanism for interagency coordination must include the following:

- (i) Agency financial responsibility. An identification of, or description of a method for defining, the financial responsibility of the public entity for providing the vocational rehabilitation services other than those listed in paragraph (b) of this section and a provision stating the financial responsibility of the public entity for providing those services.
- (ii) Conditions, terms, and procedures of reimbursement. Information specifying the conditions, terms, and procedures under which the designated State unit must be reimbursed by the other public entities for providing vocational rehabilitation services based on the terms of the interagency agreement or other mechanism for interagency coordination.
- (iii) Interagency disputes. Information specifying procedures for resolving interagency disputes under the interagency agreement or other mechanism for interagency coordination, including procedures under which the designated State unit may initiate proceedings to secure reimbursement from other public entities or otherwise implement the provisions of the agreement or mechanism.
- (iv) Procedures for coordination of services. Information specifying policies and procedures for public entities to determine and identify interagency coordination responsibilities of each public entity to promote the coordination and timely delivery of vocational rehabilitation services other than those listed in paragraph (b) of this section.

(e) Responsibilities under other law.

- (1) If a public entity (other than the designated State unit) is obligated under Federal law (such as the Americans with Disabilities Act, section 504 of the Act, or section 188 of the Workforce Investment Act) or State law, or assigned responsibility under State policy or an interagency agreement established under this section, to provide or pay for any services considered to be vocational rehabilitation services (e.g., interpreter services under § 361.48(j)), other than those services listed in paragraph (b) of this section, the public entity must fulfill that obligation or responsibility through—
- (i) The terms of the interagency agreement or other requirements of this section;
 - (ii) Providing or paying for the service directly or by contract; or (iii) Other arrangement.
- (2) If a public entity other than the designated State unit fails to provide or pay for vocational rehabilitation services for an eligible individual as established under this section, the designated State unit must provide or pay for those services to the individual and may claim reimbursement for the services from the public entity that failed to provide or pay for those services. The public entity must reimburse the designated State unit pursuant to the terms of the interagency agreement or other mechanism described in paragraph (d) of this section in accordance with the procedures established in the agreement or mechanism pursuant to paragraph(d)(3)(ii) of this section.

(Authority: Sections 12(c) and 101(a)(8) of the Act; 29 U.S.C. 709(c) and 721(a)(8))



ATTORNEY GENERAL OF ARKANSAS
Mark Pryor

Opinion No. 2002-178

July 16, 2002

John C. Wyvill, Commissioner
Arkansas Rehabilitation Services
Department of Workforce Education
1616 Brookwood Drive
Little Rock, AR 72203

Dear Mr. Wyvill:

You have presented the following questions for my opinion:

- (1) Based on current federal legislation, regulations and policy interpretations, do public and private post-secondary institutions in Arkansas have a legal responsibility for the provision of auxiliary aids and services to all students with disabilities who participate in their programs?
- (2) Based on current federal legislation, regulations and policy interpretations, is Arkansas Rehabilitation Services required to pay for the compliance obligations of public and post-secondary institutions for vocational rehabilitation consumers participating in post-secondary educational programs?
- (3) Can Arkansas Rehabilitation Services voluntarily enter into a binding legal commitment to assist a public or private post-secondary institution in meeting their compliance obligations in serving students with disabilities who are also vocational rehabilitation consumers? If so, must such an agreement require a private or public post-secondary institution to provide ARS with a substantially similar cash value of the services rendered to the institution by ARS?

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The regulations that have been promulgated pursuant to the ADA to govern public entities include a provision that states:

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

28 C.F.R. § 35.160(b)(1).

The regulations that have been promulgated pursuant to the ADA to govern public accommodations operated by private entities include a provision that states:

(a) General. A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, *i.e.*, significant difficulty or expense.

28 C.F.R. § 36.303(a).

The requirement of providing auxiliary aids and services is also imposed by the Rehabilitation Act of 1973 (as amended), 28 U.S.C. § 720 *et seq.*, and its related regulations, upon institutions that receive federal funding (including post-secondary educational institutions). That act prohibits such institutions from excluding qualified individuals with disabilities from participating in the institutions' programs because of their disabilities. 29 U.S.C. § 794. The act authorizes various agencies to promulgate regulations for the implementation of the act. *Id.* The Department of Education's regulation that applies to post-secondary institutions receiving federal funding states:

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- (3) Acquisition or modification of equipment or devices; and
 - (4) Other similar services and actions.

28 C.F.R. § 36.303(b).

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The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

The second crucial reference to the provision of "auxiliary aids and services" appears in the explanation of the term "discrimination" with reference to private entities operating public accommodations. That explanation states:

For purposes of subsection (a) of this section, discrimination includes --

* * *

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden[.]

42 U.S.C. § 12182(b)(2)(A)(iii).

The regulations that have been promulgated pursuant to the ADA are explicit in requiring both public entities and private entities operating public accommodations to provide auxiliary aids and services¹ to qualified individuals.

¹ The ADA-related regulations explain the term "auxiliary aids and services" as follows:

(b) Examples. The term "auxiliary aids and services" includes --

(1) Qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;

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(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

34 C.F.R. § 104.44(d)(1).

All of the above-cited federal laws and regulations are unambiguous in requiring post-secondary institutions to provide qualified students with auxiliary aids and services, as those terms are defined by law. Both public and private post-secondary institutions are subjects to this requirement.

Question 2 – Based on current federal legislation, regulations and policy interpretations, is Arkansas Rehabilitation Services required to pay for the compliance obligations of public and post-secondary institutions for vocational rehabilitation consumers participating in post-secondary educational programs?

Summary of Response: Assuming that that Arkansas Rehabilitation Services (ARS) is a “designated state agency,” within the meaning of the Rehabilitation Act of 1973 (as amended), it is my opinion that ARS is required to pay for the compliance obligations of public² post-secondary institutions that fail to fulfill their obligations to rehabilitation consumers participating in their programs. However, ARS is entitled to receive reimbursement from those institutions.

² I note that this requirement applies only to situations involving *public* institutions. See 29 U.S.C. § 721(a)(8)(C)(ii), quoted in the body of the opinion.

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Discussion

Although, as discussed in response to Question 1, public and private post-secondary institutions are required by law to provide certain aids and services to qualified students, the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 720 *et seq.*, requires the "designated state agency" to pay for those aids and services at a public institution if that public institution fails to do so.

The Rehabilitation Act, as amended, creates a program of federal grants for the purpose of assisting the states in establishing statewide programs for vocational rehabilitation. 29 U.S.C. § 720(a)(2). In order to receive grants under this program, the states are required to submit plans to the federal Commissioner of Rehabilitation Services for statewide provision of vocational rehabilitation services. 29 U.S.C. § 721(a)(1). The submitted plans must meet various requirements. One such requirement is that the state's plan must designate one or more state agencies that are to be responsible for the administration and supervision of the plan. 29 U.S.C. § 721(a)(2)(A). These designated state agencies are also responsible for providing or paying for auxiliary aids and services if a public entity fails to provide or pay for them. The Act does recognize the primacy of the responsibility of these other public entities to provide or pay for these aids and services, as imposed by federal or state law. 29 U.S.C. § 721(a)(8)(C)(i). However, having recognized these other public entities' primary responsibility, the Act goes on to state:

If a public entity other than the designated State unit fails to provide or pay for the services described in clause (i) for an eligible individual, the designated State unit shall provide or pay for such services to the individual. Such designated State unit may claim reimbursement for the services from the public entity that failed to provide or pay for such services. Such public entity shall reimburse the designated State unit pursuant to the terms of the interagency agreement or other mechanism described in this paragraph according to the procedures established in such agreement or mechanism pursuant to subparagraph (B)(ii).

29 U.S.C. § 721(a)(8)(C)(ii).

On the basis of the above-quoted unambiguous language from the Act, I must conclude that if a public post-secondary institution fails to pay for the required

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aids and services (and if ARS is a designated state agency within the meaning of the Act), ARS must pay for those aids and services, but is entitled to receive reimbursement from the public institution that failed to pay.

Question 3 – Can Arkansas Rehabilitation Services voluntarily enter into a binding legal commitment to assist a public or private post-secondary institution in meeting their compliance obligations in serving students with disabilities who are also vocational rehabilitation consumers? If so, must such an agreement require a private or public post-secondary institution to provide ARS with a substantially similar cash value of the services rendered to the institution by ARS?

Summary of Response: Although I cannot opine as to the legality of any hypothetical agreement, it is my opinion that Arkansas Rehabilitation Services (ARS) (assuming that it is a participant in the federal grant program established by the Rehabilitation Act, as amended) is authorized by law to enter into agreements with public and private entities providing for the coordination of the provision of required vocational rehabilitation services.

Discussion

As discussed in response to Question 2, the Rehabilitation Act, as amended, requires that participating states submit plans to the Commissioner of Rehabilitation Services for the statewide provision of vocational rehabilitation services. 29 U.S.C. § 721(a)(1). As also noted, these plans must meet various requirements. Among the items that must be addressed by the plans is the following:

(B) Interagency agreement

The State plan shall include an assurance that the Governor of the State, in consultation with the entity in the State responsible for the vocational rehabilitation program and other appropriate agencies, will ensure that an interagency agreement or other mechanism for interagency coordination takes effect between any appropriate public entity, including the State entity responsible for administering the State Medicaid program, a public institution of higher education, and a component of the statewide workforce investment system, and the designated State unit, in order to ensure the provision of vocational

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rehabilitation services described in subparagraph (A) (other than those services specified in paragraph (5)(D), and in paragraphs (1) through (4) and (14) of section 723(a) of this title), that are included in the individualized plan for employment of an eligible individual, including the provision of such vocational rehabilitation services during the pendency of any dispute described in clause (iii).

29 U.S.C. § 721(a)(8)(B).

In addition to the above requirement concerning agreements with public entities, the proposed state plan must also address the following, concerning agreements with private entities:

(24) Certain contracts and cooperative agreements

(A) Contracts with for-profit organizations .

The State plan shall provide that the designated State agency has the authority to enter into contracts with for-profit organizations for the purpose of providing, as vocational rehabilitation services, on-the-job training and related programs for individuals with disabilities under part A of subchapter VI of this chapter [29 U.S.C.A. § 795 *et seq.*], upon a determination by such agency that such for-profit organizations are better qualified to provide such rehabilitation services than nonprofit agencies and organizations.

(B) Cooperative agreements with private nonprofit organizations

The State plan shall describe the manner in which cooperative agreements with private nonprofit vocational rehabilitation service providers will be established.

29 U.S.C. § 721(a)(24).

The above-quoted sections from the Rehabilitation Act appear to indicate that agencies such as ARS can enter into agreements with other entities (both public and private) to coordinate the provision of rehabilitation services. It is not entirely clear what you mean by a "commitment to assist a public or private post-secondary institution in meeting their compliance obligations in serving students

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with disabilities who are also vocational rehabilitation consumers.” Although it is certainly conceivable that this phrase describes a commitment that could be permissible under the law, the question of whether a provision of this nature in a particular agreement meets the requirements of the Act or is otherwise legal can only be determined through analysis of the particular provision and the particular agreement.

If ARS enters into an agreement with another public entity, pursuant to the Rehabilitation Act, the agreement must address the issue of reimbursement. More specifically, the Act requires that the agreement provide the following information concerning agreements with other public entities:

Information specifying the conditions, terms, and procedures under which a designated State unit shall be reimbursed by other public entities for providing such services, based on the provisions of such agreement or mechanism.

29 U.S.C. § 721(a)(8)(B)(ii). The Act states no similar requirement with regard to agreements with private entities.

The question of the legality of a particular provision in an agreement concerning the provision of cash value for services rendered can only be evaluated on a case-by-case basis. I therefore cannot answer the second part of your question in the abstract. However, it is clear that the agreement must address the issue of the reimbursement of the designated state agency for the fulfillment of the public entity's legal responsibility to provide services.

Question 4 – If a public or private post-secondary institution refuses to provide auxiliary aids and services to a vocational rehabilitation consumer, can ARS provide the services needed and bill the institutions for the services provided and seek to recoup directly from them?

It is my opinion, as discussed more fully in response to Question 2, that if a public post-secondary institution fails to provide auxiliary aids and services that it is required by law to provide to a vocational rehabilitation consumer, ARS is required to provide such aids and services and is entitled to receive reimbursement from the public institution that failed to do so. The law apparently does not authorize the designated state agencies to seek or receive reimbursement from

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private institutions. For a more thorough discussion of this issue, see response to Question 2.

Question 5 – Can ARS refuse to purchase services from a public or private post-secondary institution that refused to provide auxiliary aids and services, hence making the services inaccessible to its vocational consumers?

Summary of Response: It is my opinion that in the absence of an agreement allowing ARS to refuse to purchase services from a public post-secondary institution because that public institution has failed to provide the services, ARS cannot refuse to purchase services from that institution. However, it is my opinion that ARS does have the discretion to refuse to purchase services from private institutions that fail to comply with the law.

Discussion

It is my understanding that this question envisions a scenario in which ARS declines to send its clients to certain post-secondary institutions that have failed to provide aids and services as required by law. Instead (under this scenario), ARS could fulfill its responsibility to provide or pay for services at another institution, rather than at the institution that failed to provide the services.

This course of action by ARS would clearly be permissible if ARS had entered into an agreement with the institution, and the agreement included a provision permitting such a course of action by ARS. In the absence of such an agreement, this scenario would require an interpretation of the law under which ARS could fulfill its responsibility at another institution, rather than at the institution that had failed to provide the required aids or services. It is my opinion that such an interpretation of the law is incorrect.

As discussed in response to Question 2, ARS is required to provide or pay for aids and services that a public institution fails to provide or pay for. Again, the requirement states:

If a public entity other than the designated State unit fails to provide or pay for the services described in clause (i) for an eligible individual, the designated State unit shall provide or pay for such services to the individual. Such designated State unit may claim reimbursement for the services from the public entity that failed to

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provide or pay for such services. Such public entity shall reimburse the designated State unit pursuant to the terms of the interagency agreement or other mechanism described in this paragraph according to the procedures established in such agreement or mechanism pursuant to subparagraph (B)(ii).

29 U.S.C. § 721(a)(8)(C)(ii).

It is my opinion that the above-quoted requirement was designed to make public institutions accessible to qualified vocational rehabilitation consumers to the same extent that they are accessible to other qualified consumers. In this regard, the language of the requirement appears to envision the provision of aids and services *at* the institution that failed to provide them. For this reason, I interpret the phrase "such services," as used in this provision, to refer to such aids and services as would make the particular public institution in question accessible to the vocational rehabilitation consumer to the same extent that that same institution would be accessible to other qualified consumers. To interpret this requirement as allowing ARS to refuse to send its clients to certain institutions would, in essence, foreclose those institutions to those clients. In my view, such an interpretation would thwart the purposes of the requirement. (I note that the client, of course, may wish to choose another institution; however, this discussion is based upon the assumption that the institution that failed to provide the aids and services is the institution that the client wishes to attend.)

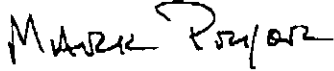
Accordingly, I conclude that in the absence of an agreement permitting ARS to choose another institution, ARS does not have the option of refusing to purchase services from a public institution that fails to provide the required aids and services. Instead, ARS must provide or pay for those services *at that institution*, and then seek reimbursement from the institution. The institution is *required* to reimburse ARS.

I reiterate that, as stated in response to Question 2, ARS's responsibility to pay for the compliance obligations of post-secondary institutions applies only to *public* institutions, and not to private ones. 29 U.S.C. § 721(a)(8)(C)(ii). It is therefore my opinion that ARS does have the discretion to refuse to purchase the services of private institutions that fail to comply with the law.

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Assistant Attorney General Suzanne Antley prepared the foregoing opinion, which
I hereby approve.

Sincerely,



MARK PRYOR
Attorney General



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Association on Higher Education and Disability (AHEAD) Update on the VR Amendments Issue

AHEAD's "Update" on the VR issue and its original letter to Janet Reno regarding this issue in 1995

For Immediate Release

For Additional Information:

Jo Anne Simon (718) 852-3528

AHEAD REAFFIRMS THE NEED FOR PROGRESSIVE FUNDING

The Association on Higher Education And Disability (AHEAD) reiterates its long standing position first articulated to U.S. Attorney General Janet Reno by letter dated July 20, 1995, that vocational rehabilitation (VR) agencies remain an appropriate primary source of funding for auxiliary aids and services (such as sign language interpreters), at institutions of postsecondary education. As such, AHEAD takes issue with the recently released position paper by the National Association of the Deaf (NAD), which advocates that postsecondary institutions take full responsibility for funding such services.

AHEAD disagrees that the advent of the ADA changes either Section 504 as it applies to postsecondary institutions or the Rehabilitation Act's mandate. Vocational rehabilitation agencies were created and exist to assist persons with disabilities in securing the services and skills needed to take their place in the workforce, which includes higher education.

AHEAD's position that VR agencies can and should collaborate with higher education in the funding of auxiliary aids and services does not suggest a lesser commitment to deaf and hard of hearing students. We welcome the full inclusion of deaf and hard of hearing students on campus. Rather, AHEAD continues to believe that "The cornerstone of the Rehabilitation Act is respect for individual dignity and promotion of inclusion, integration and full participation of the individual to increase employment, independence and self-sufficiency of persons with disabilities. 29 U.S.C. §701. Thus our position is based, as is the Rehabilitation Act, on the premise that since society as a whole benefits from the education of persons with disabilities, government, on behalf of all citizens, should pay the extra costs required to educate those students who cannot benefit from a standard academic environment alone. The most equitable way to do this is through the broadest, most progressive taxes possible, e.g.: federal and state dollars" - not the ranks of tuition paying students, whose base by definition constitutes the most regressive method of funding.

The NAD's example of telephone and television access is

appropriate. VR funding however, is much more akin to that form of access than the student tuition base. We believe that should postsecondary institutions come bear the full financial burden of communications access, deaf and hard of hearing students will de facto be denied equal access to higher education because institutions will view them as "too expensive." AHEAD cannot endorse any position, however philosophically attractive, that may lead to deaf and hard of hearing students being ostracized at institutions of postsecondary education.

Original Letter:

July 20, 1995

Hon. Janet Reno
U.S. Attorney General
Washington, D.C. 20530

RE: Council of State Administrators of Vocational Rehabilitation
correspondence of April 29, 1994

Dear Ms. Reno:

We understand that your office has received the above referenced correspondence and further that an investigation has been launched to determine the Department of Justice's position regarding the matter raised by the Council of State Administrators of Vocational Rehabilitation (CSAVR), namely, who bears the responsibility for funding auxiliary aids and services, in particular the CSAVR was concerned about interpreters for deaf students attending postsecondary educational institutions. The Association on Higher Education and Disability (AHEAD) has been consulted by telephone regarding this matter and presents its formal position herein.

We believe that individuals with disabilities, including deaf individuals, cannot be denied vocational rehabilitation services based on their status as postsecondary students. The clear federal mandate of the Rehabilitation Act and hence, state vocational rehabilitation agencies (VR agencies) funded under this mandate, is the establishment of individualized vocational goals for individuals with disabilities and the financial support for the achievement of those goals by the VR agency, whether said goals are to be achieved by attending postsecondary educational or other training.

The cornerstone of the Rehabilitation Act is respect for individual dignity and promotion of inclusion, integration and full participation of the individual to increase employment, independence and self-sufficiency of persons with disabilities. 29 U.S.C. § 701. Thus our position is based, as is the Rehabilitation Act, on the premise that since society as a whole benefits from the education of persons with disabilities, government, on behalf of all citizens, should pay the extra costs required to educate those students who cannot benefit from a standard academic environment alone. The most equitable way to do this is through the broadest, most progressive taxes possible, e.g.: federal and state dollars. For these reasons, VR agencies were established

and funding such services have been their historic mission. When educational institutions are asked to fund these services, it puts the cost on the smallest "base", other students and parents whose tuition dollars provide the operating funds to the colleges. This type of policy, as we all learned in Economics 101, is not only the most regressive type of funding but will inevitably lead to more students being denied services as internal revenue sources for colleges and universities are tapped out. This is precisely why VR agencies exist and why their historic role must not be abandoned.

While colleges and universities are clearly covered by Titles II and III of the Americans with Disabilities Act (ADA), they remain covered by Section 504 ("504") of the Rehabilitation Act of 1973, as well, the very basis upon which the ADA was modeled. Nothing in the ADA alters the ultimate responsibility of institutions of higher education to be accessible to students with disabilities. Neither does anything in the ADA suggest that traditional sources of funding such as vocational rehabilitation may not, or should not continue to be utilized. Rather, the ADA was enacted to expand the protections guaranteed individuals with disabilities by the Rehabilitation Act by requiring those same protections of entities not formerly covered by the Act. 42 U.S.C. § 12131. The purpose of Title II of the ADA was to continue "to break down the barriers" which § 504 had begun to do, by acting "in the same manner as Section 504." H.R. Rep. No. 485, 101st Cong., 2d Sess., at 49-51 (1990). To further this purpose the ADA requires that the regulations promulgated pursuant to the ADA, by the Department of Justice, be consistent with § 504 regulations as set forth in 45 C.F.R. § 84.4 See, H.R. rep. No. 485 at 49-51; 42 U.S.C. § 12134.

Therefore, there can be no question that the ADA was intended to expand the protections of § 504 and not, as the CSAVR asserts, to amend § 504 by shifting the burden of paying for interpreter services or other auxiliary aids such as readers, note takers, etc., solely to postsecondary institutions. Both the text and the legislative history of the ADA are devoid of any reference to the implementation requirements or the responsibilities of VR agencies, whereas the Rehabilitation Act specifically addresses the implementation of state plans and their responsibilities. 29 U.S.C. § 701, et seq. Therefore, the ADA does not explicitly or implicitly mitigate the VR agency's responsibility to pay for interpreter services for its clients. Furthermore, under the regulations promulgated in accordance with § 504, it is clear that the provision of auxiliary aids and services is not the primary responsibility of the postsecondary institution. 45 C.F.R. § 84.44(d), 34 C.F.R. § 104.44(d). The analysis of the final regulations provides:

The Department emphasizes that the recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges and universities. 45 C.F.R. § 84.44(d) Pt. 84, App. A, p.384 (emphasis added). See also 34 C.F.R. § 104.44(d).

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It is well settled that state VR agencies are responsible to fund interpreter services for their deaf clients. U.S. v. University of Alabama, 908 F.2d 740 (11th Cir. 1990), Jones v. Illinois Dep't Rehabilitation Services, 689 F. 2d 724 (7th Cir. 1982), Schornstein v. N.J. Div. Voc. Rehab., 519 F. Supp. 773, 779 (D.N.J. 1981). In U.S. v. University of Alabama, supra, the Eleventh Circuit held that the university will only be required to furnish interpreters "to those students who are not eligible for [Alabama Vocational Rehabilitation] assistance, [and] cannot obtain interpreter services from charitable organizations". Id. at 749. Therefore the responsibility to fund such services continues to rest with the VR agencies, and as such their refusal to provide these services is violative of the Rehabilitation Act. In other words, under the Rehabilitation Act, the college is the payor of last resort, when no other sources are available.

The weakness of the CSAVR's argument is further underscored by the fact that it relies on specific ADA regulations which it has clearly applied incorrectly. The CSAVR relies primarily on 28 C.F.R. ? 35.130(f) which states:

A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the cost of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

The CSAVR asserts that a college's requiring a disabled student to simply apply for VR services is equivalent to a "surcharge". This interpretation does not coincide with the clear language of the regulation which ties the concept of "surcharge" to the "cost" of providing for auxiliary aids. Not only does the explanation of the regulation contained in Part 35, App. A, not address the interpretation asserted by the CSAVR, the explanation's reference to the payment of interpreters when court costs are awarded clearly refers to monetary considerations. The regulation is clearly intended to prohibit the entities from charging disabled students more money based on their needs for auxiliary aids and does not in any manner address the VR agency's duty to fund these services. Not only is this interpretation not supported in the legislative history or regulatory guidance of the ADA, it is contradictory to the guidance which is clearly provided under ? 504, namely that colleges and universities are encouraged to "assist[] students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies. . ." 45 C.F.R. ? 84.44(d), Part 84, App. A, p.384 (emphasis added). Thus a college's asking a disabled student to apply for VR services is not only not a surcharge, it is the institution's responsibility under the law to make the suggestion.

We suspect that the CSAVR's position is grasping at straws. We understand that the CSAVR's concerns about dwindling funding are very real, yet postsecondary institutions are not in any better position to deal with these concerns, as their funds are also being cut in the face of increasing mandates. We suspect, therefore, that the motivation for the CSAVR argument is financial not legal. Whatever the motivation, the CSAVR's

position regarding funding of auxiliary aids is insupportable as a matter of law and violates the clear mandate underlying its very existence. We urge you to consider that the well settled state of the law should remain the Department's position on this issue.

Very truly yours,

Loring Brinckerhoff
President

cc: Hon. Judith Heumann
Hon. Deval Patrick

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or its contents, please email us:**

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